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In The

Supreme Court of the United States

October Term, 1994

CALIFORNIA DEPARTMENT OF CORRECTIONS, CALIFORNIA MEDICAL FACILITY, JAMES GOMEZ, EDWARD YLST, CAROLINE LOPEZ,

Petitioners,

v.

ALI MOYO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Petitioners California Department of Corrections, California Medical Facility, James H. Gomez, Edward Ylst and Caroline Lopez hereby reply to Respondent Ali Moyo's Brief in Opposition.

REASONS FOR GRANTING THE PETITION

I. The Questions Presented Are Framed By the Opinion Below

Petitioners herein have requested that this Court settle the questions whether an employee-employer relationship can be found between a prison inmate and the prison in which the inmate is incarcerated under section

703(a)(1) of Title VII of the Civil Rights Acts, 42 U.S.C. § 2000e-2(a)(1), and whether a finding of such status is a prerequisite to Respondent's claim of retaliation under section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a). (Petition for a Writ of Certiorari, hereinafter "Pet." at i, 10-22.)

Respondent asserts that this Court will not reach the questions presented by Petitioners because, in *Moyo v. Gomez*, 32 F.3d 1382 (9th Cir., filed August 8, 1994, *amended* November 14, 1994), the Ninth Circuit concluded that the question whether the inmates are employees under Title VII is "wholly irrelevant" to a determination of Respondent's Section 704(a) claim. (Respondent's Brief in Opposition, hereinafter "Opp.," at 3, 5, citing Supplemental Appendix to the Petition for a Writ of Certiorari, hereinafter "Supp. App.," at 7.)

To the contrary, the Ninth Circuit's formulation of a *prima facie* case of retaliation under Section 704(a) to require Respondent Moyo to show that "(1) he engaged in a statutorily protected activity (i.e. that he protested or otherwise opposed unlawful employment discrimination *directed against employees protected by Title VII*)[,]" renders intrinsically illogical the Ninth Circuit's conclusion that the status of the inmates as employees under Title VII is "wholly irrelevant to Respondent's Section 704(a) claim." (Supp. App. at 5-6, 7, 8-9.) Simply put, in the Ninth Circuit's own words, Moyo *cannot* make out a *prima facie* case of retaliation under Section 704(a) unless he can show that he opposed unlawful discrimination directed *against employees* protected by Title VII. Thus, the question whether the inmates as to whom Respondent opposed alleged discrimination are employees of Petitioner California Department of Corrections is integral to determine the viability of Respondent's Section 704(a) claim.

Respondent also asserts that this Court will affirm the Ninth Circuit's reversal of the district court's judgment based on the Ninth Circuit's holding that the terms

of Section 704(a) make it unlawful to require an employee to discriminate *irrespective of whether or not the target of discrimination is an employee.* (Opp. at 4, citing Supp. App. at 7.) This holding is void, *ab initio,* because, as hereinabove described, a *prima facie* case of retaliation under Section 704(a) requires a Section 704(a) claimant to show that he protested or otherwise opposed unlawful employment discrimination directed *against employees* protected by Title VII. (Supp. App. at 5-6.) The Ninth Circuit's construction of Section 704(a) to permit a claim thereunder to be founded upon alleged opposition to discrimination against persons who have no connection with the employment relationship contravenes the Ninth Circuit's formulation of a *prima facie* case of retaliation under Section 704(a) as well as the statutory language thereof. Inasmuch as this theory is both logically and legally invalid, affirmance of the Ninth Circuit's reversal on this ground is implausible.

Respondent asserts that review by this Court will result in affirmance on a second ground for reversal articulated by the Ninth Circuit, to wit, that Moyo may state a Section 704(a) claim by showing that he reasonably believed that the inmates were protected by Title VII without regard to their status as employees. (Opp. at 4, citing Supp. App. at 7.) The flaw in this holding is evident when the precedent on which the Ninth Circuit relied to reach this ground for reversal is examined.

Specifically, the Ninth Circuit cited *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008 (9th Cir. 1983), for the proposition that "[i]t is not necessary that the employment practice actually be unlawful; opposition clause protection will be accorded 'whenever the opposition is based on a *"reasonable belief"* that the employer has engaged in an unlawful employment practice.' " (Supp. App. at 6, citing *Crown Zellerbach,* 720 F.2d at 1013 (emphasis in text).) In *Crown Zellerbach,* the court addressed whether a letter sent by a group of employees

to a customer of their employer constituted opposition to an unlawful employment practice. *Id.* at 1010-11. Finding that the opposed unlawful *employment practices* could be discerned from the context of the letter, the court held that the letter constituted statutorily protected expression of opposition and that the employees had established the first element of a *prima facie* case under Section 704(a). *Id.* at 1013-14.

As is evident, the facts in *Crown Zellerbach* are not remotely analogous to the facts in *Moyo*. In *Crown Zellerbach*, the employees' opposition to an alleged unlawful *employment practice* was discernible from the face of the letter which expressed such opposition. *Crown Zellerbach*, 720 F.2d at 1013. In *Moyo*, no unlawful employment practice is discernible from Moyo's alleged opposition to discriminatory treatment of inmates *unless* the inmates are deemed employees of Petitioner California Department of Corrections.

Crown Zellerbach also addressed whether the employees' opposition was based on a "reasonable belief" that the employer had engaged in an unlawful employment practice. *Id.* at 1013. In that regard, the court explained that the dismissal of the employees' unlawful employment practice charges on their merits was irrelevant because the reasonableness of the employees' belief that the employer had practiced discrimination was shown by a federal agency's finding that such practices were discriminatory. *Id.* at 1013 n.2. Thus, reasonableness of the employees' belief turned not on whether the employees reasonably believed that the practice opposed was an employment practice but on whether the employees reasonably believed that the opposed employment practice *actually was unlawful*.

The foregoing application of the phrase "reasonable belief that the employer has engaged in an unlawful employment practice" is buttressed by additional Ninth Circuit precedent relied on in *Moyo*. (Supp. App. at 6,

citing *Learned v. City of Bellevue*, 860 F.2d 928, 932 (9th Cir. 1988).) In *Learned*, the Ninth Circuit circumscribed the boundaries of Section 704(a) with respect to the reasonableness of an employee's belief that an unlawful employment practice had been committed. *Learned*, 860 F.2d at 932. The Ninth Circuit stated:

> Although courts liberally construe the provisions of section 704(a) to effectuate the remedial purposes of the Act, . . . , the opposition clause, by its terms, protects only those employees who oppose what they reasonably perceive as discrimination *under the Act*. An employee need not establish that the opposed conduct in fact violated the Act in order to establish a valid claim of retaliation. That is, an employee may fail to prove an "unlawful employment practice" and nevertheless prevail on his claim of unlawful retaliation. However, *the opposed conduct must fairly fall within the protection of Title VII to sustain a claim of unlawful retaliation. Silver v. KCA, Inc.* 586 F.2d 138, 142 (9th Cir. 1978) ("under the clear language of the "opposition" clause of [section] 704(a), *a case of retaliation has not been made out unless the "retaliation" relates to the employee's opposition to a [section] 703 violation*")
> . . . .

Learned, 860 F.2d at 932 (emphasis in original; emphasis added; citation omitted).

Under the principles enunciated in *Crown Zellerbach* and in *Learned*, Respondent Moyo cannot state a Section 704(a) retaliation claim based on a reasonable belief that the opposed conduct constituted an unlawful employment practice unless he can show that the retaliation related to his opposition to a Section 703 violation. Respondent cannot do so unless the inmates as to whom he opposed alleged discriminatory treatment were employees of Petitioner California Department of Corrections. Thus, the question whether those inmates are

employees for the purposes of Title VII is not "wholly irrelevant" to but is inextricable from Moyo's Section 704(a) retaliation claim.

As demonstrated, both Respondent and the Ninth Circuit err in concluding that the question whether the inmates are employees under Title VII is wholly irrelevant to the determination of Respondent's retaliation claim under Section 704(a). Because the primary predicate for Respondent's opposition to the Petition is invalid, this Court should grant the Petition.

II. The Opinion Below Substantially Deviates from and Will Have a Nationwide Impact on Existing Title VII Law.

Respondent asserts that the *Moyo* opinion does not create a new class of persons entitled to sue under Title VII because *Baker v. McNeil Island Corrections Center*, 859 F.2d 124 (9th Cir. 1988), a Ninth Circuit opinion discussed in *Moyo*, "opened the door to inmate claims under Title VII." (Opp. at 6-7, citing *Hill v. Davidson*, 844 F. Supp. 237 (E.D. Pa. 1994) (finding that an inmate's allegation that he was denied employment in prison because of his race gives rise to an action under Title VII).)

Irrespective of whether *Baker* or *Moyo* opened the door, the fact remains that, under *Moyo*, an inmate can be found to be an employee of the prison in which incarcerated for the purposes of Title VII. This is found in *Moyo*'s factual recitation that the practice opposed by Respondent was Petitioners' practice of allowing showers after *work shifts* to White inmates but not to Black inmates *working the same job shift*. (Supp. App. at 4.) This recitation read in tandem with the Ninth Circuit's nebulous statement that "we might be unable to say, based on the bare facts in the complaint, that the inmates here were not 'employees' under Title VII," (Supp. App. at 8), expressly permits the inmates to be classified as employees of Petitioner California Department of Corrections. Thus, *Moyo*

cannot be read in a manner which does not conflict with the Equal Employment Opportunity Commission's Decision 86-7 and Policy Statement on Work Release Programs. (*See* Pet. at 12-17, discussing Decision of the U.S. Equal Employment Opportunity Commission, Decision No. 86-7 (April 18, 1986) (Appendix to Petition for Writ of Certiorari, hereinafter "App.," at 18-25); U.S. Equal Employment Opportunity Commission, Policy Statement: Work Release Programs (May 30, 1986) (App. at 26-33).)

Respondent's assurances that *Baker*, not *Moyo*, first allowed inmate claims under Title VII diminishes neither the fact that *Moyo* substantially deviates from established Title VII law by allowing an employer-employee relationship between prison and inmate for the purposes of Title VII nor the national impact thereof.

III. The Opinion Below Conflicts with Existing Title VII Law

Respondent asserts that neither *Baker* nor *Moyo* contradict EEOC Decision 86-7 because Decision 86-7 was limited to its facts; thus, "in wholly unrelated cases, an employment relationship could exist between inmates and the prisons which incarcerated them for purposes of Title VII." (Opp. at 8.) Decision 86-7 does not sustain Respondent's argument.

The core fact considered in Decision 86-7 and the major premise for the EEOC's holding that the inmate was not an employee of the prison was that "the primary purpose of the association between the inmate and the prison was incarceration, not employment." (App. at 23.) Because incarceration is an element which cannot be excised from any relationship between prison and inmate, Respondent cannot rationally posit that the facts considered in Decision 86-7 are so unique that, "in wholly unrelated cases," an employee-employer relationship between inmate and prison may exist under Title VII.

Moreover, the EEOC's direct quotation of Decision 86-7 in its Policy Statement on Work Release Programs demonstrates that Decision 86-7 establishes not a rule of limitation, but a rule of general application which precludes finding a direct employment relationship between inmate and prison under Title VII. (App. at 32.)

Respondent asserts that the EEOC Policy Statement on Work Release Programs is limited to circumstances in which a third party is involved and, on that basis, argues that the Policy Statement does not support the rule that an inmate may sue under Title VII only when the prison interferes with an inmate's employment opportunities with a third-party employer. (Opp. at 9.) Respondent's position is negated by the fact that the Policy Statement expressly addressed both the relationship between inmate and jail and the relationship between inmate, jail and a third-party employer. (App. at 32.) As to the former, the Policy Statement affirmed the rule previously articulated in Decision 86-7. (*Id.*) As to the latter, the Policy Statement enunciated the rule that an inmate is not protected by Title VII absent interference by a prison with an inmate's employment opportunities with a third-party employer. (*Id.* at 32-33.) Hence, the Policy Statement must be read to establish the rule that inmates' Title VII remedies are limited to third-party employer situations. (App. at 32-33.)

Respondent's assertion that *Moyo* does not conflict with the Tenth Circuit opinion in *Williams v. Meese*, 926 F.2d 994 (10th Cir. 1991) is belied by Respondent's admission that the opinion in *Moyo* as well as in *Baker* will allow a direct employment relationship to be found between inmate and prison for the purposes of Title VII. (Opp. at 8.) *Williams v. Meese* held unequivocally that an inmate cannot be an employee of the prison in which incarcerated for purposes of Title VII. *Williams*, 825 F.2d at 997. Because *Moyo* as well as *Baker* will permit a contrary result, these Ninth Circuit opinions cannot be

reconciled with the Tenth Circuit's opinion in *Williams v. Meese*.

IV. The Record Contains the Facts Necessary to and Appropriate for Resolution of the Questions Presented

Respondent Moyo's Amended Complaint purports to state a claim under Section 704(a) based on allegations that Petitioners retaliated against Respondent when he opposed Petitioners' alleged discriminatory practices against inmates. (Supp. App. at 4.) In response to Petitioners' Motion to Dismiss under Federal Rules of Civil Procedure, Rule 12(b)(6), Respondent argued that his opposition was to a practice made unlawful by Title VII because the relationship between the inmates and Petitioner California Department of Corrections was that of employee-employer. (App. at 16.) The district court correctly applied Ninth Circuit precedent and granted Petitioners' Motion to Dismiss on the ground that the relationship between inmate and prison is not one of employee-employer; thus, the opposed conduct was not protected by Title VII. (*Id.*) On appeal, the parties extensively briefed the question whether, under Title VII, the inmates as to whom Respondent opposed alleged discriminatory practices could be deemed employees of Petitioner California Department of Corrections. The primary questions presented to the courts below are identical to the questions presented for review by this Court. Therefore, the record is replete with and not, as Respondent argues, devoid of facts necessary to resolve the questions herein presented. (*See* Opp. at 10.)

As demonstrated, the Ninth Circuit in *Moyo* misapplied precedent and contradicted its own formulation of a *prima facie* case of retaliation under Section 704(a) which requires that the opposed discrimination be directed against employees protected by Title VII. Such error resulted in the flawed holding that whether or not the

inmates are employees is "wholly irrelevant" to Respondent's Section 704(a) claim. Moreover, as Respondent admits, under *Moyo*, an employee-employer relationship can be found between inmate and prison for the purposes of Title VII. The opinion in *Moyo* demonstrably conflicts with existing Title VII law and presents urgent questions of national significance which are best settled now. Accordingly, this Court should grant the Petition for Writ of Certiorari.

CONCLUSION

For all of the foregoing reasons and for the reasons set forth in the Petition for a Writ of Certiorari, Petitioners respectfully request that this Court grant the Petition for Review.

DATED: December 29, 1994

Respectfully submitted,

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